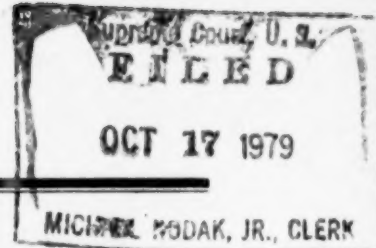


No. 79-335



IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

SHELL OIL COMPANY, AMOCO PRODUCTION COMPANY,
and NORTHERN MICHIGAN EXPLORATION COMPANY,
Petitioners,

v.

WEST MICHIGAN ENVIRONMENTAL ACTION COUNCIL,
INC., *et al.*,
Respondents.

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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Petitioners, Shell Oil Company, Amoco Production Company, and Northern Michigan Exploration Company, herein reply to the brief in opposition filed on behalf of respondents, West Michigan Environmental Action Council, Inc., *et al.*

I.

Respondents take the familiar tack of trying to lead this Court to believe that resolution of the issues raised by the petition would require delving into the record. However, while offering up their own version of the proceedings below, respondents fail to deny these sa-

lient points which demonstrate, in and of themselves, that petitioners were deprived of their rights to due process of law:

At the close of plaintiffs' case, all the allegations in their complaint relating to the alleged impact of oil drilling upon elk and wildlife were struck by the trial court;

The only operative allegation of plaintiffs' complaint left in the case was directed to the alleged failure of the Michigan Natural Resources Commission ("NRC") to make findings associated with its approval of the Consent Order;

Plaintiffs' motion, after the close of their case, to amend the complaint to allege substantive impact issues by attacking the drilling permits was denied by the trial court, since defendants had "cross-examined" witnesses [and] prepared their case on the basis" of the original complaint which challenged only the Consent Order (Petrn. 7);

Defendants offered no evidence concerning elk or wildlife;

At the close of all the evidence, the trial court held that "essentially, this suit boils down to the Court's consideration of paragraph 16 of the Complaint" attacking the NRC's failure to make "findings" (Petrn. A. 45a) and further stated that the allegations of impact on elk and wildlife were "not well pled and with no attempt to amend" the complaint to include them (Petrn. A. 48a);

The four-member majority of the Michigan Supreme Court acknowledged that there was "confusion" and "uncertainty" in the proceedings concerning whether

impact-on-wildlife issues were ever properly pled (Petrn. A. 5a), but nonetheless entered judgment for respondents solely upon such issues; and

Three of the seven justices of that court dissented and would have remanded the proceedings on the ground that "defendants may have been denied an opportunity to present evidence" on the elk-impact issue because of their "belief, shared by the judge, that the effect of test drilling was not in issue." (Petrn. A. 22a).

Under these circumstances, it is clear beyond question that petitioners were not given notice with the clarity required by the Due Process Clause that the elk issue was still in the case at the time they were called upon to present their defense, *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978), so that the Michigan Supreme Court's determination to enter judgment against them on that issue violated the rule of this Court in *Saunders v. Shaw*, 244 U.S. 319 (1917).

II.

1. None of the ancillary contentions advanced by the respondents detracts from this conclusion. Their repeated reference to the fact that petitioners and the State defendants did not plead the affirmative defenses only serves to confirm the position advanced by the petitioners here. Petitioners consistently claimed in the trial court that the complaint did not properly raise any substantive impact issues as to elk or otherwise, since it only attacked the NRC's Consent Order. The trial court accepted this view of the case at the close of plaintiffs' evidence, when it struck all of the substantive impact issues.

It was at that point respondents moved, finally, for leave to amend their complaint to attack the drilling permits themselves. The trial court refused to allow this amendment, since it would have "prejudice[d]" the defendants, who had prepared their defense on the basis of the position that the substantive impact issues were not in the case. (Petr. 7). Obviously, had the court allowed this eleventh-hour amendment of the complaint, petitioners would have had the right to file an answer to the amended complaint and therein plead the affirmative defenses which were unnecessary in response to the respondents' original complaint. Thus, respondents' admission that the Michigan Supreme Court entered judgment against petitioners because they "failed to plead the affirmative defense" to substantive claims (Opp. 3), merely helps to demonstrate the error of the court below.

2. Respondents misleadingly quote remarks of the trial judge in his refusal to strike the prayer for relief associated with Count I of the plaintiffs' complaint so as to leave the impression that petitioners were on notice that the substantive elk-impact issues were still in the case. (Opp. 4). The language which petitioners quote from the record at that point omits the following sentence that immediately precedes the court's statement concerning its power to issue injunctive relief:

"So the fact that the permits are not before me doesn't seem to me to prevent the Court from reacting to the proofs that the Consent Order was improperly entered into *by virtue of the findings surrounding it*, and that therefore activity taken pursuant to it would be inappropriate for one to go forward with it." (R. 1079) (emphasis supplied).

Thus, the language upon which respondents rely simply shows that the trial court held it could enjoin operations under the Consent Order pursuant to the respondents' procedural theory that the Order was "entered without findings."¹

3. Respondents cite statements made by petitioners' counsel in his closing argument dealing with the substantive impact of drilling so as to leave the impression that petitioners conceded those issues were still in the case at that point. However, all of petitioners' counsel's arguments addressing these substantive issues (R. 1222-30) were made after he preserved the position that the only issue in the case, following the grant of defendants' motions addressed to plaintiffs' complaint, concerned the procedural question of whether the NRC's Consent Order was entered without adequate findings (R. 1220).² Since respondents were urging the trial court, in effect, to reinstate their substantive claims, counsel for petitioners was surely entitled to comment on those substantive arguments, while preserving the

¹ It is, of course, commonplace in procedural cases under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, for courts to issue injunctions turning upon an agency's failure to make findings with respect to or to describe adequately the agency's action. *See, e.g.,* Vermont Yankee Nuc. Power Corp. v. NRC, 435 U.S. 519 (1978).

² Thus, petitioners' counsel argued before he responded to plaintiffs' substantive contentions that:

"Clearly, if you read the whole thing, the Order, in and of itself, can't be construed as allowing or leading to or causing pollution, impairment or destruction.

"Now, if you get past that point, and I would urge the Court not to get past that point, because I think based on the Complaint that is the only real issue that you've got to look at." (R. 1220).

position that the trial court should limit its consideration to the procedural issue.

4. Respondents rely on the fact that three witnesses testified on behalf of defendants following the trial court's action dismissing all but the procedural issue.³ However, the two state-defendants' witnesses described the way in which the environmental impact statement was prepared and the sole witness put on by petitioners discussed his consulting firm's report, which was viewed as a supplement to the EIS. (Petn. 8, n.6). While that latter witness in this context did discuss the effects of an oil spill upon ground water contamination, an issue not even mentioned by the Michigan Supreme Court, such testimony helped demonstrate the adequacy of his firm's report on that question. Moreover, respondents do not even claim that petitioners introduced any evidence on the effects of drilling on elk, bobcat and bear, the sole issue of concern to the Michigan Supreme Court.

³ Respondents' effort to make the trial appear long and thorough (Opp. 3), ignores the fact that most of the case disappeared at the close of their proof. In fact, 3,200 of the 4,000 pages of transcript and 49 of the 50 exhibits were devoted to respondents' case in chief, which of course was radically reduced by the trial court's grant of petitioners' motions at the close of respondents' case.

CONCLUSION

For the reasons stated above and in the petition itself, this case could appropriately be the subject of summary disposition by this Court. Alternatively, the petition should be granted and the case should be set for plenary consideration.

Respectfully submitted,

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